

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 July 1992

relating to a proceeding under Article 85 of the EEC Treaty

(Case IV/32.725 — Viho/Parker Pen)

(Only the English and German texts are authentic)

(92/426/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Article 15 (2) thereof,

Having regard to the complaint lodged by Viho Europe BV, Maastricht (Netherlands), on 19 May 1988 against Parker Pen Limited, Newhaven (United Kingdom) pursuant to Article 3 (1) of Regulation No 17,

Having regard to the Commission Decision of 21 January 1991 to initiate proceedings,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19 (1) of Regulation No 17 in conjunction with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 ⁽²⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. THE FACTS

Object of the proceeding

- (1) This proceeding relates to obstacles to parallel imports of Parker Pen products from Germany and

Italy to the Netherlands. The proceeding was initiated as a result of a complaint lodged by the Dutch undertaking Viho Europe BV on 19 May 1988. This Decision does not relate to the policy of the Parker Pen undertaking to refer enquiries from local customers to the local Parker subsidiary.

The parties

- (2) (a) Parker Pen Ltd (Parker), Newhaven, United Kingdom is a leading manufacturer of a variety of writing utensils with a worldwide turnover of £ [...] ⁽³⁾ (some ECU [...]) in 1989 as against £ [...] (some ECU [...]) in 1988. In 1991, Parker's turnover in the Community was £ [...] (some ECU [...]). Some 2 600 persons were employed by Parker worldwide in 1991.
- (b) API SpA, Italy, (API), deals essentially in office equipment and maintains a distribution network mainly in Italy. API has been distributing Parker products in Italy since 1949. Its turnover in 1990 amounted to ECU [...] million, of which some ECU [...] million was accounted for by Parker products. API is a medium-sized family undertaking with 188 employees. There are no written agreements with Parker.
- (c) Herlitz AG, Germany (Herlitz), manufactures a broad range of office supply articles and associated products. It operates at both the wholesale and retail stages. At the retail stage, distri-

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

⁽³⁾ In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

bution is carried out through McPaper GmbH and a variety of dependent shops and sales areas ('shop within a shop') in Germany. As part of its business at both the wholesale and the retail stage, Herlitz also distributes the products of other manufacturers.

Herlitz carries out about one third of its business outside Germany. Its turnover in 1988 was DM [...] (some ECU [...]). On 18 August 1986, Parker and Herlitz concluded an agreement on the distribution of Parker products in Germany. Article 7 of the agreement prohibits any export without Parker's written consent. The products concerned were Parker writing utensils in the medium-price range, which are sold mostly in department stores.

- (d) Viho Europe BV (Viho), the Netherlands, deals in the import and export of office equipment and cinematographic productions, particularly in the Community countries. Its turnover in 1988 was Hfl [...] (ECU [...]).

The products

- (3) The relevant products are writing utensils, except pencils and technical drawing instruments, manufactured and distributed by Parker. In particular, the products involved are fountain pens and ball-point pens.

The market

- (4) The relevant product market comprises writing utensils in the medium and upper price ranges. The Commission believes that the Parker group holds a strong position on the relevant market. However, it has not been possible to establish that it holds a dominant position on the market. According to the information provided by Parker, it has the following market shares on the individual European markets:

— Portugal :	[...] %
— Denmark :	[...] %
— Greece :	[...] %
— Netherlands :	[...] %
— Belgium :	[...] %
— Italy :	[...] %
— United Kingdom :	[...] %
— Spain :	[...] %
— Germany :	[...] %
— France :	[...] %

There are no precise figures for Ireland and Luxembourg. The Community market share including those two countries is around [...] %.

- (5) Parker's turnover in the Member States of the Community in the 12 months up to 29 February 1988 was as follows:

(in £'000)

Worldwide turnover	Turnover in the Community (*)				
		1988	1989	1990	1991
[...]	<i>Sales by subsidiaries to trade customers</i>				
	United Kingdom	[...]	[...]		
	France	[...]	[...]		
	Germany	[...]	[...]	[...]	[...]
	Spain	[...]	[...]		
	Netherlands	[...]	[...]		
	Belgium and Luxembourg	[...]	[...]		
	<i>Sales by Parker to independent distribution companies:</i>				
	Vialga, Portugal	[...]	[...]		
	Econ SA, Greece	[...]	[...]		
	API SpA, Italy	[...]	[...]		
	William Gaw, Ireland	[...]	[...]		
	Aktieselskabet Chr. Olsen Holding, Denmark	[...]	[...]		

(*) Turnover in the Community broken down into sales by subsidiaries to trade customers and sales by Parker to its independent distribution companies in Portugal, Greece, Italy, Ireland and Denmark.

(Source: Parker)

- (6) Parker has wholly-owned subsidiaries in Spain, France, the United Kingdom, the Netherlands, Belgium and Germany. In the other Member States of the Community, Parker has concluded distribution agreements with independent importers.

The conduct against which complaint has been made

- (7) Viho has for a number of years been endeavouring to distribute Parker products. For this purpose, it has obtained price quotations from various Parker subsidiaries in the Community. In its complaint, Viho states that it has never been supplied.

During the hearing, however, the complainant conceded that it had obtained Parker products from firms which were not Parker distributors. It is also evident from the telex message of 25 November 1987 from Viho to the Italian firm API that Viho declared that it was prepared to supply individual Parker products or possibly the whole range of such goods (see recital 8).

- (8) On 19 November 1986, Viho asked API for a price quotation. On 24 November 1986, API replied: 'Sorry, we cannot be of help but we are distributors for Parker for the Italian market only and we cannot export'.

It should be added, however, that, on 19 November 1987, Viho approached API for a second time, asking it for a price quotation for a relatively large quantity of goods (20 000 Vector Rollerballs). On 24 November 1987, API replied that it had difficulty supplying such a large amount because of brisk business in the run-up to Christmas, but nevertheless quoted a price of Lit [...] and stated that in principle it was prepared to supply Viho.

On 25 November 1987, Viho replied that it found the price quoted to be excessively high and therefore not of interest and added that it could if need be itself supply API with all the Parker products, since it had the whole range of such products.

- (9) On 20 and 24 April 1989, Viho asked Herlitz to quote a price. On 24 April 1989, Herlitz replied: 'Leider müssen wir Ihnen mitteilen, daß wir keine der o.g. Produkte exportieren dürfen' (Unfortunately we must inform you that we are not allowed to export any of the abovementioned products). The telex message of 25 April 1989 from Herlitz contains the following statement: '[...] we can sell

quite a number of (our products) but not the product that you had asked for [...] It is not that Herlitz does not want to sell, but is bound to a contract'.

- (10) During an investigation carried out on Herlitz's premises on 19 and 20 September 1989, Commission officials found a distribution agreement stated 18 August 1986. The agreement entered into force on 1 March 1987 and had a term of five years.

Paragraph 7 of the agreement reads as follows: 'Herlitz wird Parker-Artikel ausschließlich in der Bundesrepublik Deutschland vertreiben. Jeglicher Vertrieb über die Landesgrenzen hinaus ist Herlitz untersagt bzw. nur mit schriftlicher Erlaubnis durch Parker gestattet.' (Herlitz will distribute Parker articles solely in the Federal Republic of Germany. Any distribution by Herlitz outside Germany is prohibited and may take place only with Parker's written consent.)

Although Parker submitted that the express export ban had been inserted into the distribution agreement on the personal initiative of a marketing director who did not have Parker's authority to do so, the company did not contest the objective fact of an infringement. It limited itself to the comment that the action of which it was accused was unintentional.

Price differences in the Community and termination of the infringement

- (11) As may be seen from the table in recital 4, Parker products have a not insignificant market share in the Community. There are in the case of such products price differences between Member States that result in conditions under which a parallel trade may develop. This is confirmed by Viho's repeated attempts to obtain the products from distributors in other Member States. The above-mentioned refusals to export impeded parallel imports from Germany. These restrictions operated as from 1986 at the latest.

- (12) Parker acknowledges that the wording of the distribution agreement concluded between it and Herlitz in August 1986 infringes Article 85 (1) of the EEC Treaty. For this reason, as part of a wide-ranging programme to comply with the competition rules (the so-called compliance programme) initiated by Parker (see recital 14), Parker revoked this clause with immediate effect in a letter to Herlitz dated 28 September 1989.

On 18 December 1989, Parker sent Herlitz the draft of a new distribution agreement which was to enter into force with retroactive effect as from 1 October 1989. The new agreement does not contain any clause prohibiting exports, but it has not yet entered into force.

Acting promptly in response to the Commission's express representations, Parker informed its exclusive distributors in Denmark, Ireland, Italy, Greece and Portugal by letter dated 14 May 1991 they they were free to supply customers outside their territory.

- (13) In the case of API, it cannot be deduced from its answer to Viho dated 19 November 1986 whether there was an agreement between it and Parker to prohibit exports from Italy, as Viho claimed. API did send Viho a telex message on 24 November 1987 offering to supply Parker products. It has, however, not been possible to show, as Viho asserted, that API made this offer only for appearances' sake and, accordingly, at unacceptable prices.
- (14) Lastly, it should be mentioned that Parker drew up, both for its Community subsidiaries and also for its sole distributors, a wide-ranging programme on compliance with Community competition law, so as to ensure that the competition rules were observed in future.

II. LEGAL ASSESSMENT

A. Article 85 (1)

- (15) Parker and Herlitz are undertakings within the meaning of Article 85 of the EEC Treaty. The agreement between Parker and Herlitz is an agreement within the meaning of that Article.
- (16) The distribution agreement concluded between Parker and Herlitz on 18 August 1986 contains an express ban on exports. This export ban had as its object the restriction of competition through the prevention of parallel imports.

Provisions of this type infringe Article 85 (1). The Court of Justice has ruled in various judgments (Miller⁽¹⁾, Tipp-Ex⁽²⁾, Sandoz⁽³⁾) that agreements on the restriction of exports within the common

market are by their nature a restriction of competition within the meaning of Article 85 (1) and that, if this proves to be the object of an agreement, the actual implementation of a restriction laid down in an agreement does not have to be proved.

According to Parker, the express export ban in the distribution contract is attributable to the personal initiative of a marketing director who had not consulted the firm's competent departments. The circumstances in which the clause in question was inserted into the contract and signed by an official of the company who did not have the relevant authority does not remove Parker's responsibility at all. The company remains liable whether on the principle of *culpa in eligendo* or of *culpa in vigilando*.

It is true that the distribution agreement was concluded between Parker and Herlitz and that the abovementioned telex message to Viho was sent by Herlitz GmbH Co. KG.

It is also true that, as Herlitz asserts, these are two different companies having their own legal personality. However, in view of the fact that Herlitz GmbH & Co. KG is a wholly-owned subsidiary of Herlitz, both companies are regarded as forming a single economic entity. As is evident from the telex message of 25 April 1989, the subsidiary pursued the parent company's policy and felt itself bound to the agreements with it⁽⁴⁾.

Herlitz further stated during the hearing that it was a service undertaking with ancillary activity as a producer and supplied mainly department stores on the basis of the 'shop within a shop' principle. It supplemented its range with products from other brands, such as Parker products. However, it was not interested in supplying any firms that wished to pick and choose only given products. After the hearing, Herlitz added that its reference to the export ban as the justification for refusing Viho had been made only so as not to appear too disobliging in turning down the request. The prevention of parallel imports or the safeguarding of individual markets within the European Community had never been the object, purpose or even the result of the export ban clause. In addition, the distribution agreement concluded between Parker and Herlitz had never been implemented.

⁽¹⁾ Case 19/77, Miller International Schallplatten v. Commission, [1978] ECR 131.

⁽²⁾ Case C-279/87, Tipp-Ex v. Commission, [1990] ECR I-261.

⁽³⁾ Case C-277/87, Sandoz v. Commission, [1990] ECR I-45.

⁽⁴⁾ See Case 107/82, AEG-Telefunken v. Commission, [1983] ECR 3151, paragraph 50 at p. 3199.

The Commission cannot agree this reasoning. Furthermore, it takes the view the arguments which Herlitz derives from the application of the 'shop within a shop' principle are irrelevant. The telex message of 25 April 1989 from Herlitz to Viho proves that Herlitz also dealt in products not manufactured by it.

The fact that Herlitz exported Parker products to Austria and Switzerland proves that it traded in such products. Within the common market, however, despite its assertions to the contrary, it did apply the distribution agreement that existed between it and Parker. This is evident from the two telex messages from Herlitz to Viho. Herlitz therefore felt bound by the agreement with Parker under which it was prohibited in particular from engaging in exports.

This restriction in commercial freedom of manoeuvre meets the applicability criteria of Article 85 (1). The Commission therefore concludes that there is a clear breach of competition law.

- (17) Article 85 (1) is thus applicable to the agreement between Herlitz and Parker.
- (18) Parker has substantial market share with its products on the Community market described above. The agreement between Parker and Herlitz was such as to appreciably affect trade between Member States by restricting parallel imports and exports.
- (19) As is evident from its reply of 19 November 1986 in which it stated 'sorry, we cannot export ...', API has in at least one instance declined to quote prices to Viho for Parker products. However, this is not sufficient evidence to allow the commission to conclude that on this point viho's complaint was founded. This view is borne out by the fact that API had already, half a year before the complaint was lodged, started quoting prices to Viho at its request.

B. Article 85 (3)

- (20) The agreement between Parker and Herlitz that contained the export ban or had such a ban as its object was not notified to the Commission. Furthermore, such a restriction of exports is one of the exceptions specified in Article 4 (2) of Regulation No 17. Individual exemption under Article 85 (3) cannot therefore be granted.

Even if the agreement had been notified, it would not have been possible to grant exemption from the prohibition laid down in Article 85 (1), since the export ban cannot be regarded as indispensable to improving and because it is moreover harmful to consumers.

C. Article 15 (2) of Regulation No 17

- (21) The above considerations lead the Commission to conclude that Parker and Herlitz have infringed Article 85 (1) of the EEC Treaty and that Article 85 (3) is not applicable.
- (22) Under Article 15 (2) of Regulation No 17, the Commission may by decision impose on undertakings fines from ECU 1 000 to ECU 1 million, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently of the fine, regard must be had both to the gravity and to the duration of the infringement.
- (23) The Commission is of the opinion that the imposition of a fine on Parker is justified in the instant case. Parker should have known that the agreement had the object of preventing parallel imports or exports. Community law is clear on this point: export bans are always restrictions of competition. This has long been established in the decisions and case law of the Commission and the Court of Justice. It was not possible for Parker to be unaware of this fact.
- (24) As regards the amount of the fine imposed on Parker, the Commission took the following points in particular into account:
 - 1. the actions which are the subject of this Decision represent a serious infringement of the competition rules laid down in the EEC Treaty, since they significantly hinder the integration of the common market;
 - 2. since Community law is unmistakably clear on this point, the restrictions of competition with which the undertaking is charged represent serious infringements of Community competition law;
 - 3. the infringement lasted at least from the beginning of March 1987 to the end of September 1989. The infringement was terminated only by the letter dated 26 September 1989 from Parker to Herlitz, after Commission officials had brought the illegal agreement to light during the investigation carried out on the premises of Herlitz on 19 and 20 September 1989;
 - 4. Parker is part of a large group of companies with considerable turnover and with subsidiaries and major representatives on the market for writing utensils in the community;
 - 5. during the investigations, Parker was very co-operative. At the time it declared itself ready to cease all practices that proved incompatible with Community competition law and, in September 1989, withdrew the illegal provision in its distribution agreement with Herlitz;

6. Parker attempted in 1987 to place its relationship with its subsidiaries and its exclusive dealers on a legally unobjectionable basis by instructing a legal adviser to draw up a wide-ranging programme on compliance with community competition law, which was completed in 1989.

However, Parker did not apply the programme to its agreement with Herlitz. Nevertheless, in order to ensure future compliance with the competition rules and in response to express representations by the Commission, Parker did in 1991 inform all its distributors in the community that they were free to supply customers outside their territory.

- (25) A fine must also be imposed on Herlitz. It too signed the agreement and implemented it until 1989 at any rate. Herlitz was under no illusions as to the applicability of the provisions laying down the prohibition. The management of the undertaking was aware that the export ban clause was incompatible with Article 85, but it abided by it so as to meet Parker's wishes and in agreement with it, although the fact cannot have escaped Herlitz that this resulted in the prevention of parallel imports and exports.

- (26) In imposing the fine on Herlitz, the commission recognizes that Herlitz's own responsibility in bringing about the provision in the agreement that restricted competition is smaller, since it is to be assumed that Herlitz was merely complying with Parker's wishes.

In view of Herlitz's subordinate role, the Commission takes the view that the fine to be imposed on Herlitz should therefore be smaller than that imposed on Parker,

HAS ADOPTED THIS DECISION :

Article 1

Parker Pen Ltd and Herlitz AG have infringed Article 85 (1) of the EEC Treaty by including an export ban in an agreement concluded between them.

Article 2

The following fines are hereby imposed on the undertakings specified below :

- a fine of ECU 700 000 on Parker Pen Ltd,
- a fine of ECU 40 000 on Herlitz AG.

The fines shall be paid within three months of the date of notification of this Decision to the following account of the European Communities :

Account No 310-0933000-43
Commission of the European Communities
Banque Bruxelles-Lambert
Agence Européenne
5, Rond-Point Schuman
B-1040 Brussels.

After three months, interest shall automatically be payable at the reate charged by the European Monetary Cooperation Fund on its ECU transactions on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 13,75 %.

Should payment be made in national currency, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 3

Parker Pen Ltd shall not adopt any measures having the same object or the same effect as the Treaty infringements established.

Article 4

This Decision is addressed to :

1. Parker Pen Ltd
Newhaven
GB-East Sussex BN9 0AU
2. Herlitz AG
Reuchlingstraße 10
D-1000 Berlin 21

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 15 July 1992.

For the Commission

Leon BRITTAN

Vice-President